(5)

No. 90-762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS AND SHARON FREYTAG, JOE AND GLADYS WOMBLE, BERT AND MILDRED TIMM, KENNETH AND CANDACE McCOIN,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

KATHLEEN M. SULLIVAN
Counsel of Record
BRIAN STUART KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4633

RICHARD J. SIDEMAN
MARTHA A. BOERSCH
SIDEMAN & BANCROFT
One Embarcadero Center
Suite 860
San Francisco, California 94111
(415) 392-1960
Counsel for Petitioners

March 1, 1991

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Are complex, precedent-setting tax cases affecting thousands of parties and billions of dollars among the "other proceeding[s]" that 26 U.S.C. § 7443A(b)(4) allows the United States Tax Court to assign to a special trial judge for trial and effective resolution?

2. Does the Appointments Clause of Art. II, § 2, cl. 2, which allows Congress to confer power to appoint inferior officers on the "Courts of Law" and the "Heads of Departments," permit Congress to grant the Chief Judge of the Tax Court power to appoint special trial judges?

3. Does a party's consent to have its case heard by a special trial judge constitute a waiver of any right to challenge the appointment of that judge on the basis of the Appointments Clause, Art. II, § 2, cl. 2?

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITES (cont.)

TABLE OF AUTHORITES (cont.)

***Constitutional Provisions*:**

TABLE OF AUTHORITES (cont.)

Statutes:

TABLE OF AUTHORITES (cont.)

TABLE OF AUTHORITES (cont.)

Regulations:

Rules:

Legislative Materials:

TABLE OF AUTHORITES (cont.)

Miscellaneous:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 904 F.2d 1011 and reprinted as Appendix A.[1] The opinion of the United States Tax Court is reported at 89 T.C. 849 and reprinted as Appendix B.

JURISDICTION

The decision of the Court of Appeals was entered on July 6, 1990. A timely petition for rehearing was denied on August 15, 1990. See Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A timely Petition for Writ of Certiorari was granted by this Court on January 22, 1991.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

The pertinent portions of Art. I, § 8, Art. II, § 2, and Art. III, §§ 1-2 are set forth in Appendix E. The text of 26 U.S.C. § 7443A is set forth in Appendix F. Tax Court Rule 183 is set forth in the Appendix to the Petition at A91-92.

STATEMENT OF THE CASE

At issue here is whether a complex, precedent-setting tax deficiency case involving three thousand taxpayers and approximately $1.5 billion in alleged tax deficiencies may be tried and effectively decided by a "special trial judge" appointed by the Tax Court, rather than by a duly-appointed judge of the Tax Court itself. Petitioners contend that the assignment and decision below exceed the statutory authority of a special trial judge, and that even if Congress has permitted such an assignment, the Constitution does not, for special trial judges are

[1] All appendix citations are to the appendices bound with the Petition for Writ of Certiorari unless otherwise noted. Page citations to the appendices in the Petition will be styled "A____." Page citations to the Joint Appendix will be styled "JA____."

appointed in violation of the Appointments Clause of the Constitution, Art. II, 2, cl. 2.

1. The Tax Court

In 1969 Congress "established, under Article I of the Constitution of the United States, a court of record to be known as the United States Tax Court." 26 U.S.C. § 7441.[2] The court consists of 19 judges appointed by the President with the advice and consent of the Senate to 15-year terms. *See* 26 U.S.C. § 7443(a),(b) and (e); (A73). The Tax Court's predecessor, known as the Board of Tax Appeals, was neither an Article I court nor an Executive Department, but "an independent agency in the Executive Branch of the Government." Internal Revenue Code of 1954, 26 U.S.C. § 7441 (1958).[3] One of the primary purposes of the 1969 legislation was to strip the Tax Court of its previous "constitutional status as an executive agency, no matter how independent." S.Rep. No. 552, 91st Cong., 1st Sess. 302 (1969) ("Since the Tax Court has only judicial duties, . . . it is anomalous to continue to classify it with quasi-judicial executive agencies that have rule-making and investigatory functions.").

2. Special Trial Judges

"Special trial judges," in contrast to regular Tax Court judges, are appointed not by the President but rather by the Chief Judge of the Tax Court pursuant to 26 U.S.C. § 7443A(a). (A100). They number 14, and preside over fully 42% of the

[2] Section 7441 is a codification of § 951 of the Tax Reform Act of 1969, Pub.L.No. 91-172, 83 Stat. 730.

[3] The Board was originally established in 1924. *See* § 900 of the Revenue Act of 1924, 68th Cong., 1st Sess., c. 234, 43 Stat. 253. Although its title was changed to "the Tax Court of the United States" in 1942, *see* § 509 of the Revenue Act of 1942, 77th Cong., 2d Sess., c. 619, 56 Stat. 957, it remained until 1969 an "agency in the Executive Branch." *See* Internal Revenue Code of 1954, 26 U.S.C. § 7441 (1958).

Tax Court's docket pursuant to 26 U.S.C. § 7443A(b)&(c).[4] Special trial judges are appointed to indefinite terms, 26 U.S.C. § 7443A(a), but in practice may serve for as long or longer than the 15-year statutory term of a regular Tax Court judge.[5]

The office of "special trial judge" grew out of a Tax Court practice that began in 1943, when Congress authorized the Chief Judge of the court "from time to time by written order, [to] designate an attorney from the legal staff of the court to act as a commissioner in a particular case," subject to "such rules and regulations as may be promulgated by the Tax Court."[6] Tax Court rules permitted commissioners to prepare a report of proposed findings of fact to which the parties could file exceptions and which was reviewed by a division of the Tax Court. Tax Court Rule 48 (1958). However, the designation of staff attorneys on an *ad hoc* basis to conduct hearings and prepare proposed factual findings was opposed by most Tax Court judges and therefore rarely used. See H. DuBroff, *The United States Tax Court: An Historical Analysis* 346-47 (1979) ("DuBroff").[7] Indeed, for the first five years that the Tax Court enjoyed the power to designate its staff lawyers to act as commissioners, not a single designation was ordered. *See id.* at 346. The prevailing view was that designation of commissioners "would not result in any substantial savings of time because the judges were still required to study the record in order to reach a decision and prepare an opinion," since a

[4] Out of the 54,428 cases pending in the Tax Court on February 28, 1990, special trial judges had been assigned 8,781 small tax cases pursuant to 26 U.S.C. §§ 7443A(b)(2) & (3) and 14,500 complex so-called tax shelter cases pursuant to § 7443A(b)(4). (A73).

[5] The United States Tax Court Reports reveal that at least one current special trial judge has served for 21 years and that at least two others have served for 12 years or longer.

[6] Internal Revenue Code of 1939, 26 U.S.C. § 1114, as amended by § 503 of the Revenue Act of 1943, Pub.L.No. 78-235, 58 Stat. 21, 72. This provision was codified without substantial change in the Internal Revenue Code of 1954, 26 U.S.C. § 7456(c) (1958).

[7] Professor DuBroff's study was commissioned by the Tax Court. *See* Dubroff at iii.

commissioner "would not be able to convey accurately the 'sense' of the witnesses to the judge charged with the writing of the opinion." *Id.* at 347.

In 1969, in the same legislation that converted the Tax Court into an Article I tribunal, Congress provided for a full-time office of "commissioner," later redesignated "special trial judge," and authorized the Tax Court's Chief Judge to "appoint" such officers as the court deemed necessary.[8]

The principal use Congress envisioned for these newly full-time officers was presiding in cases filed under a new, streamlined small case procedure established by the 1969 Act.[9] Simplified, informal procedures were provided "at the option of the taxpayer" and a decision in such a small tax case "would not be a precedent for future cases and would not be reviewable on appeal." S.Rep. No. 91-552 at 303; 26 U.S.C. § 7463(a) &(b). (A93). Using special trial judges to hear these cases would facilitate "a procedure whereby the taxpayers with relatively small claims may have reasonable access to the Tax Court without impairing the Court's ability to deal with" its burgeoning caseload. S. Rep. No. 91-552 at 303; *see id.* at 302, 304; DuBroff at 349-50 & n.407.

In 1974 Congress authorized the Tax Court to assign special trial judges to hear a new category of declaratory judgment actions relating to employee pension plans, and even to allow them actually to make the decision of the Tax Court in those

[8] Section 958 of the Tax Reform Act of 1969, Pub.L.No. 91-172, 83 Stat. 487, 734. This provision was originally codified at 26 U.S.C. § 7456(c), but it has been recodified, as amended, at 26 U.S.C. § 7443A. The current title of "special trial judge" formally replaced the previous title of "commissioner" in 1984, *see* Tax Reform Act of 1984, Pub.L.No. 98-369, § 464, 98 Stat. 494, 824, although commissioners had commonly been referred to in Tax Court parlance as special trial judges since this appointed office was established by Congress in 1969. *See, e.g.*, Dubroff at 350 & n.409. For convenience, petitioners will reflect this practice by referring to the post-1969 "appointed" officers as "special trial judges" and to their pre-1969 "designated" staff attorney predecessors as "commissioners."

[9] Section 957 of the Tax Reform Act of 1969, Pub.L.No. 91-172, 83 Stat. 487, 734. This provision was and continues to be codified at 26 U.S.C. § 7463.

cases.[10] In 1976 Congress empowered special trial judges to hear and decide additional, enumerated declaratory judgment cases (involving classification of charitable organizations).[11] Although this "authorization to use [special trial judges] was designed to provide the Tax Court with flexibility in the event of a large number of cases," it was understood that such use would probably "be limited to the hearing and deciding of cases involving issues similar to those in other cases that have previously been heard and decided by judges of the court." DuBroff at 351. *See* H.R. Rep. No. 1280, 93d Cong., 2d Sess. 332 (1974).

In 1978 Congress again expanded the authority of special trial judges to hear and "make the decision" of the Tax Court in additional enumerated declaratory judgment actions, and for the first time granted special trial judges authority formally to "make the decision" of the Tax Court in small tax cases as they could already do in declaratory judgment actions.[12] Such decisions by special trial judges were "subject to such conditions and review as the court may by rule provide," 26 U.S.C. § 7443A(c), leaving the Tax Court entirely free to decide for itself whether to review such decisions, and if so, to set the standard for review by a rule or directive that the Court was not required to publish.[13]

In 1984, Congress once again expanded the jurisdiction of special trial judges. Prior to that date, the law provided that:

> [T]he Chief Judge of the Tax Court may assign to the Court's [special trial judges] for hearing and decision any declaratory judgment proceeding, any

[10] *See* The Employee Retirement Income Security Act of 1974, Pub.L.No. 93-406, § 1041(a), 88 Stat. 829; DuBroff at 351.

[11] *See* The Tax Reform Act of 1976, Pub.L.No. 94-455, §§ 1042, 1306, 90 Stat. 1717.

[12] *See* Revenue Act of 1978, Pub.L.No. 95-600, §§ 336(b)(1), 502(b), 92 Stat. 2841 & 2879. These provisions were originally consolidated and codified at 26 U.S.C. § 7456(d), and then recodified at 26 U.S.C. § 7443A. (A100).

[13] *See* H.R. Conf. Rep. No. 1800, 95th Cong., 2d Sess. 278 (1978).

> small tax case proceeding, and any other proceeding where the amount in dispute does not exceed $5,000, subject to such review as the Court may provide.

H.R.Rep. No. 432, 98th Cong., 2d Sess. 1568 (1984). In order "to clarify that additional proceedings may be assigned to [special trial judges] so long as a Tax Court judge must enter the decision," *id.*, Congress added the provision now found in § 7443A(b)(4), allowing the Tax Court to assign a special trial judge to hear "any other proceeding which the Chief Judge may designate." (A100).[14] Despite the sweeping language of that provision, Congress deemed its addition to be merely

> [a] technical change . . . made to allow the Chief Judge of the Tax Court to assign any proceeding to a special trial judge for hearing and to write proposed opinions, subject to review and final decision by a Tax Court judge, regardless of the amount in issue. However, special trial judges will not be authorized to enter decisions in this latter category of cases.

H.R.Rep. No. 98-432 at 1568.

The Tax Court has set forth the standard under which it reviews the report of a special trial judge in Tax Court Rule 183: a special trial judge submits a "report, including his findings of fact and opinion," to the Tax Court, which may "adopt . . . or modify it" but may *not* provide *de novo* review of the evidence, because the "findings of fact recommended by the special trial judge *shall be presumed to be correct*." Tax Court Rule 183(b)-(c) (A91-92) (emphasis added). The only court to have construed this Rule interpreted it as limiting Tax Court

[14] *See* Tax Reform Act of 1984, Pub.L.No. 98-369, § 463(a), 98 Stat. 494, 824 (1984). The jurisdiction of the special trial judge was originally codified at 26 U.S.C. § 7456(c)&(d), but in 1986 these subsections were recodified without significant change at 26 U.S.C. § 7443A(b)(1) - (b)(4). *See* Tax Reform Act of 1986, Pub.L.No. 99-514, § 1556, 100 Stat. 2085, 2754-55 (1986).

review of special trial judge findings of fact to the highly deferential "clearly erroneous" standard. *See Stone* v. *Commissioner*, 865 F.2d 342, 344-47 (D.C. Cir. 1989). In practice, special trial judge factual findings and legal opinions are routinely adopted verbatim by the regular Tax Court judges to whom they are assigned.[15]

A special trial judge also wields a substantial portion of the Tax Court's other powers. He may rule on all pretrial and trial motions without any review by the Tax Court; may compel the production of evidence, swear witnesses, and issue subpoenas; may "do all acts and take all measures necessary or proper for the efficient performance of his duties;" and "may exercise such further and incidental authority . . . as may be necessary for the conduct of trials or other proceedings." Tax Court Rule 181.[16] As interpreted below (A7) and by the Tax Court itself (A76-78), 26 U.S.C. § 7443A allows a special trial judge to preside over *any* Tax Court case, to formally enter the decision in many narrow and minor tax matters, and to issue findings and opinions that may be adopted verbatim by the Tax Court without meaningful review even in the most complex, significant and far-reaching cases, as they were here.

As a consequence of the 1984 amendment, the Tax Court has transferred a huge and ever-increasing portion of its work to its 14 special trial judges, who now preside over fully 42% of the court's docket, including over 14,500 "tax shelter" cases involving complex tax issues and billions of dollars, which alone constitute 26% of the Tax Court's total caseload.

3. The Proceedings Below

Petitioners' cases are among three thousand taxpayer petitions pending in the Tax Court that raise the issue whether

[15] Indeed, the only published Tax Court decision overruling the factual findings of a special trial judge was *Rosenbaum* v. *Comm'r*, 45 T.C.M. (CCH) 825 (1983), which was promptly reversed for failure to defer to the special trial judge's opinion. *Stone* v. *Comm'r*, 865 F.2d at 347.

[16] The complete Tax Court Rules may be found in 26 U.S.C.A. following § 7453 (1989).

losses incurred on certain forward contracts may be claimed as deductions. (A2, A14).[17] These cases were assigned to Tax Court Judge Richard C. Wilbur, who established a "test case" procedure in which ten cases (including petitioners') were selected for consolidated discovery, trial, briefing and decision. (A5, A15) (JA 1). Trial commenced in late 1984 but was repeatedly interrupted by Judge Wilbur's illness. In November 1985, Chief Judge Samuel Sterrett assigned Special Trial Judge Carleton Powell to preside over the trial as an evidentiary referee; the proceedings were videotaped so that Judge Wilbur could view the evidence at home and prepare his findings and opinion upon recovery. (A5-6) (JA 2).

Judge Wilbur's illness forced his retirement in April 1986. (A6, A72). In July 1986, the Chief Judge notified the parties that he would assign their cases to Special Trial Judge Powell for preparation of findings and an opinion to be submitted to Judge Wilbur, unless anyone objected to this assignment. (A6) (JA 8-9). Petitioners consented to this reassignment only on the express condition that the special trial judge's report be submitted to (and the case ultimately decided by) Judge Wilbur or Chief Judge Sterrett. (A6) (JA 9, 10-11).[18] By that time, Special Trial Judge Powell had already presided over nine weeks of trial as an evidentiary referee. (JA 3-4).

The case was reassigned to Chief Judge Sterrett when Special Trial Judge Powell filed his proposed findings and opinion with the Tax Court on October 21, 1987, disallowing all of petitioners' investment loss deductions. (JA 6, 15). The special trial judge's filing of his report and its verbatim adoption by Chief Judge Sterrett appear from the record to have been virtually simultaneous. The order reassigning the matter to Chief Judge Sterrett and his own opinion adopting the report were typed together on the very same line of the docket sheet and

[17] Petitioners invoked the jurisdiction of the Tax Court pursuant to 26 U.S.C. § 6213.

[18] One corporate taxpayer, Wilhide, Inc., objected to the reassignment in August 1986. That case was severed and is not at issue here. (JA 6).

simultaneously served on the parties that very same day. (JA 6). Thus Chief Judge Sterrett — who had heard none of the 14 weeks of complex financial testimony spanning two years of trial, nor could possibly have had time to review the 9,000 pages of transcript and the 3,000 exhibits — adopted the special trial judge's opinion verbatim and entered it as the Tax Court's decision. (A6, A7) (JA 6).

Petitioners appealed the Tax Court decision to the Court of Appeals for the Fifth Circuit, arguing, *inter alia*, that the decision was invalid because the governing statute, 26 U.S.C. § 7443A, did not allow the Tax Court to assign this complex tax case to a special trial judge for hearing and effective resolution. On July 6, 1990, the court below held that since this issue was "in essence, an attack upon the subject matter jurisdiction of the special trial judge, it may be raised for the first time on appeal" (A7), but it rejected the claim on the merits. Although the court found that "the special trial judge filed his report on October 21, 1987" and that the "Chief Judge adopted this report as the Tax Court's opinion and formally filed the decision that same day" (A7), it held that there was no evidence "even remotely suggest[ing]" that the special trial judge effectively decided the case, "other than the short time span between the filing of the special trial judge's report and the issuance of the Tax Court's opinion by its chief judge." (A8). The formalities were sufficient to satisfy the Fifth Circuit: "Our analysis begins and ends with the simple fact that the opinion in this case was issued by the Tax Court in the name of the chief judge." (A7).

Petitioners further argued that the Tax Court's decision was invalid because trial had been conducted and the findings and opinion had been prepared by a special trial judge appointed in violation of the Constitution by the Chief Judge of the Tax Court, who is neither a "Head[ ] of Department[ ]" nor a member of a "Court[ ] of Law" as required by the Appointments Clause, Art. II, § 2, cl.2. The court below declined to reach the merits of this argument, holding that, "[b]y consenting to

the assignment of their case at the time it was made, the Taxpayers waived this objection." (A8 n.9).

4. The Related Proceedings in *Samuels, Kramer & Co.* v. *Comm'r.*

After the appeal to the Fifth Circuit had been filed but before that court rendered its decision on July 6, 1990, another group of taxpayers raised these same arguments in the Tax Court in the related case of *Samuels, Kramer & Company* when the Tax Court likewise assigned that case to Special Trial Judge Powell. (A72-73).[9] On April 9, 1990, the Tax Court held that it could constitutionally appoint special trial judges because it was a "Court[ ] of Law" within the meaning of the Appointments Clause. (A83-86). The Tax Court certified its order for interlocutory appeal (A89, A96) and the Court of Appeals for the Second Circuit granted Samuels' motion for leave to appeal. *Samuels, Kramer & Co.* v. *Commissioner*, Nos. 90-4060/90-4064 (pending, 2d Cir.).

Oral argument was held on October 24, 1990. The Commissioner (respondent here) was represented by the Solicitor General of the United States, who argued that the Chief Judge of the Tax Court constitutionally wields appointment power as the "Head" of a duly-constituted Executive "Department," but that the Tax Court certainly cannot be deemed a "Court of Law" within the meaning of the Appointments Clause. The opposing position that the Tax Court is not an Executive Department but a "Court of Law," was presented by former Solicitor General Erwin N. Griswold, appearing as *amicus curiae* on his own behalf.

[9] Samuels, Kramer & Co. was the investment advisor for the firm with which the petitioners had their investment accounts. (A72). In the Tax Court the case was captioned *First Western Government Securities, Inc., et al.* v. *Commissioner*, 94 T.C. 32 (1990). This opinion is reprinted as Appendix C.

5. The Government's Shifting Position In This Case

While litigating this case and the related case of *Samuels, Kramer & Co.*, the Justice Department has staked out a bewildering variety of positions on the constitutional status of the Tax Court under the Appointments Clause. In the fall and winter of 1989, the government contended in the Fifth Circuit that the Tax Court qualifies as a "Court of Law" that may be vested with appointment power under Art. II, § 2, cl.2. However, the government soon discovered that President Bush, when signing legislation authorizing the Article I Claims Court to appoint special masters analogous to Tax Court special trial judges, had stated on December 19, 1989 that the appointment of inferior officers by such Article I tribunals violated the Appointments Clause. (A103). While *Freytag* was pending before the Fifth Circuit, the government wrote to that court admitting that its constitutional analysis was "in tension" with the President's position. (A102).

Meanwhile, the Tax Court in *Samuels, Kramer* declined to be characterized as an Executive "Department" and held itself to be a "Court of Law" under the Appointments Clause. (A83-86). The Solicitor General then argued to the Second Circuit in that case that the Tax Court is definitely not a "Court of Law" but rather a "Department" within the Executive Branch.

On January 22, 1991, this Court granted a writ of certiorari to the Court of Appeals for the Fifth Circuit and directed the parties to brief the additional question whether a challenge under the Appointments Clause can be waived by consent to a hearing before a special trial judge.

SUMMARY OF ARGUMENT

Since 1969, when the Tax Court was established as an Article I court, it has made ever-increasing use of "special trial judges" appointed by the Chief Judge of the Tax Court to hear and resolve its cases. Tax Court work is now almost evenly divided between the presidentially appointed regular judges,

who number 19 and serve for 15-year terms, and the special trial judges, who number 14 and preside over fully 42% of the Tax Court docket. Special trial judges are assigned not only to narrow declaratory judgment cases and small tax claims, but also to even the most lengthy, complex, and precedent-setting tax deficiency controversies, such as the 3,000-party, $1.5 billion "tax shelter" case below.

This practice far exceeds the bounds of the statutory authority Congress has conferred upon the Tax Court. The statute governing the use of special trial judges, 26 U.S.C. § 7443A, codifies 15 years of careful, specific, and incremental grants of power by Congress. Between 1969 and 1984, Congress authorized the Tax Court to assign special trial judges, with the taxpayer's consent, to hear and later to make formal decisions in small tax claims. Authority was later given to hear and make formal decisions in a variety of declaratory judgment actions. The legislative history of these developments makes clear that Congress intended special trial judges to aid the regular Tax Court judges by presiding over narrow, repetitious or minor matters, not to function as full-fledged surrogates for the Tax Court judges themselves.

Yet the court below read a 1984 amendment to the statute to effectively elevate the special trial judges to just that status. Section 7443A(b)(4) of Title 26 of the U.S. Code, which codifies the 1984 amendment, authorizes the Chief Judge to assign special trial judges "to any other proceeding the chief judge may designate," in addition to the narrow declaratory judgment and small tax cases enumerated in subsections (b)(1)-(3). The court of appeals read this language literally, as giving the Tax Court a blank check to assign to special trial judges even its most complex and challenging cases.

This holding should be rejected, and (b)(4) read far more narrowly. Subsection (b)(4), which Congress deemed a mere "technical change," should not be construed to have licensed the wholesale transfer of effectively dispositive power to special trial judges. It makes no provision for taxpayer consent, and

specifies no standard for Tax Court review — in sharp contrast, for example, to the statutes governing federal magistrates. The court below took comfort from the fact that special trial judges may not formally enter their own findings and opinions in (b)(4) cases, but may do so only under the signature of a regular Tax Court judge. But no such solace is justified, for the Tax Court's own rules guarantee that the special trial judge will effectively decide (b)(4) cases: special trial judge findings of fact must be "presumed to be correct," and in "tax shelter" cases like this one, the facts are everything.

Even if the governing statute is read broadly to authorize the assignment to the special trial judge below, the Constitution bars that assignment. For the Appointments Clause, Art. II, § 2, cl.2, permits Congress to vest the power to appoint inferior officers only in the President, the "Heads of Departments," or "the Courts of Law." Special trial judges are without doubt "inferior officers," but the Tax Court, a specialized Article I tribunal, is neither a "Department" nor a "Court of Law."

The purpose of the Appointments Clause was to limit the diffusion of the awesome power to appoint officers, and to distance such power from the Legislature. The Clause achieves these goals by allowing Congress to confer power to appoint inferior officers only on two groups of officials: first, the President himself and his "Heads of Departments," who are accountable to the President's own electoral constituency and who enjoy political and constitutional checks preserving their independence from Congress; and second, the "Courts of Law," who are protected by the tenure and salary provisions of Article III.

The Tax Court does not fit within the language or fulfill the purposes of the Appointments Clause. The term "Department" has consistently been interpreted by the Framers and by this Court, at each of the several places it appears in the Constitution, to refer exclusively to the great, Cabinet-level Executive Departments, and not to any lesser bureau or tribunal. Simi-

larly, the term "Courts of Law" has been understood to refer exclusively to the only other courts mentioned in the Constitution — the Article III courts, which possess the necessary independence from Congress to wield appointment power. If either of these constitutional terms were stretched to include a specialized Article I forum such as the Tax Court, then the Appointments Clause would cease to impose any meaningful limit on congressional latitude to confer appointment power on nearly any organ of the federal government outside the Legislative Branch.

Fortunately, the availability of a reasonable but far more narrow interpretation of 26 U.S.C. § 7443A(b)(4) obviates the need to confront this grave constitutional question. For if (b)(4) is construed to prevent the assignment of a complex tax case such as this one to a special trial judge, the constitutional issue may be avoided.

If the Court nevertheless finds it necessary to resolve the Appointments Clause issue, it may do so — because that issue cannot be and has not been waived. This Court has consistently held that an objection to a judicial proceeding predicated on one of the Constitution's *structural* principles, in contrast to the assertion of a *personal* right guaranteed by the Constitution, is too important to be left to the vagaries of individual litigation strategies. The parties in a lawsuit can waive their own procedural rights but they cannot "consent" to a violation of the Constitution's structural plan. An Appointments Clause challenge is purely structural and has no personal rights component at all.

Even if Appointments Clause objections were sometimes waivable, the supposed "consent" below cannot be deemed free and voluntary. In contrast to the regime under which federal magistrates operate in the District Courts, the statutes and rules governing the assignment of (b)(4) cases to special trial judges do not require taxpayer consent and hence make no provision for ensuring that such consent is knowing, free, and voluntary, especially when the assignment occurs not at the

outset of the proceeding but only after trial has gone on for months. Moreover, under the particular circumstances of this case, petitioners' acceptance of the belated, mid-trial assignment to a special trial judge cannot be deemed voluntary, for the coercive alternative was to scrap one of the longest trials in Tax Court history and begin all over again. That Hobson's Choice was no choice at all, and petitioners' "consent" therefore should not prevent this Court from considering petitioners' structural constitutional claim.

The systemic interest in maintaining the constitutional plan of separation of powers has often led this Court to reach and decide issues not considered in the courts below. Since the Appointments Clause issue was raised in the Court of Appeals and has now been fully briefed by the parties, the Court should proceed to decide it, and reverse the judgment below. The constitutional flaw is easily remedied by remand for a new trial before a properly appointed Tax Court judge. And if the Tax Court requires additional manpower, the most obvious solution is for Congress openly to expand the number of presidentially appointed Tax Court judges, just as Congress periodically does with District Court judges, *not* for the Tax Court to appoint its own surrogates, with neither the careful scrutiny nor the public accountability that accompany appointment by the President.

ARGUMENT

I. CONGRESS HAS NOT AUTHORIZED SPECIAL TRIAL JUDGES TO HEAR AND EFFECTIVELY RESOLVE COMPLEX TAX CASES INVOLVING UNSETTLED LEGAL ISSUES, THOUSANDS OF PARTIES AND BILLIONS OF DOLLARS.

This Court has long adhered to the "cardinal principle" that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.*

v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The statutory construction below plainly raises "serious constitutional problems" under the Appointments Clause (see Part II, *infra*) — so serious as to have driven the federal government itself into profound internal disarray. This problem may be readily avoided by a more narrow interpretation of the statute.

This Court's "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Public Citizen* v. *Dept. of Justice*, 109 S.Ct. 2558, 2572 (1989). Accordingly, this Court in recent Terms has avoided a number of serious separation-of-powers questions by construing federal statutes narrowly. For example, in *Public Citizen*, the Court read the Federal Advisory Committee Act not to apply to advice given by a standing committee of the American Bar Association to the Justice Department about federal judicial nominations, thus avoiding the need to decide whether the Act intruded upon presidential nomination prerogatives under the Appointments Clause. *See* 109 S.Ct. at 2560, 2572-73. Similarly, in *Coit Independent Joint Venture* v. *FSLIC*, 109 S.Ct. 1361 (1989), the Court read the statutes governing the Federal Savings and Loan Insurance Corporation (FSLIC) not to preclude *de novo* judicial consideration of state-law claims against insolvent savings and loan associations that had been placed in FSLIC receivership, thus avoiding the question whether such preclusion would violate Article.III. *See id.* at 1371. And in *Gomez* v. *United States*, 109 S.Ct. 2237 (1989), the Court construed the Federal Magistrates Act, 26 U.S.C. § 631 *et seq.*, not to permit magistrates to conduct felony trial jury voir dire, thus likewise avoiding a serious question under Article III. *See id.* at 2246 n.25.

In this case, as in *Public Citizen*, *Coit* and *Gomez*, a vexing structural constitutional question will be presented unless this Court construes the statute more narrowly than did the court below. The Fifth Circuit read 26 U.S.C. § 7443A(b)(4) to confer upon special trial judges appointed by the Tax Court a

scope of jurisdiction fully coextensive with that of presidentially appointed Tax Court judges — so long as special trial judge opinions in (b)(4) cases are formally "issued by the Tax Court in the name of" a regular Tax Court judge. (A7). Such a construction would permit a special trial judge to hear and effectively decide literally *any* Tax Court case, no matter how many parties were affected, no matter how complex or unsettled the legal issues, and no matter how broad the precedential effect. If the statute is so construed, and the assignment to the special trial judge below is thus deemed permissible under the statute, then a thorny constitutional question under the Appointments Clause will necessarily be presented.

Fortunately, however, a "construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). For here, as in *Gomez*, "a reasonable alternative interpretation pos[ing] no constitutional questions . . . readily may be deduced from the context of the overall statutory scheme." 109 S.Ct. at 2241.

A. The "Any Other Proceeding" Language Of 26 U.S.C. § 7443A(b)(4) Must Be Read In Light Of The Narrow Grants Of Jurisdiction in §§ (b)(1)-(3).

The Tax Court and the Fifth Circuit have misinterpreted § 7443A(b)(4) by reading it in isolation from adjoining provisions and outside the context of two decades of measured congressional development of special trial judge jurisdiction. This Court does not always read expansive language such as § 7443A(b)(4)'s reference to "any other proceeding" to mean what, in isolation, it literally says. "Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." *Public Citizen*, 109 S.Ct. at 2566. In *Gomez* v. *United States*, 109 S.Ct. 2237 (1989), this Court considered an expansive "catch-all" provision in the Federal Magistrates Act, 28 U.S.C. § 631, that is similar to the "any other proceeding" provision of § 7443A. Despite the broad

language of the Magistrates Act, which permits magistrates to be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636(b)(3), this Court unanimously held — without reaching the constitutional question — that magistrates could not conduct felony jury selection, because the catch-all provision had to be read in light of the earlier, specific grants of power:

> When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties.

Id. at 2241.

This rule is equally applicable here. Section 7443A(a) creates the office of special trial judge and § 7443A(b) specifies the duties of that office to include the handling of declaratory judgments and small tax cases. Complex tax shelter cases involving thousands of parties and unsettled issues of law are not included in this enumeration nor are they in any way related to such minor or limited tax disputes. Therefore, a special trial judge may not preside over them.

This modest view of special trial judge jurisdiction is confirmed by the careful congressional development of that office since 1969. The office of special trial judge was created in 1969 primarily to implement a new small case procedure whose burdens, Congress feared, might "impair[ ] the [Tax] Court's ability to deal with the cases coming before it." S.Rep. No. 91-552 at 303. Simplified, informal procedures were provided, taxpayer consent was required, and the decision in a small tax case "would not be a precedent for future cases and would not be reviewable on appeal." *Ibid.*

Thereafter, as was the case with the Magistrates Act at issue in *Gomez*, came a "gradual congressional enlargement of . . . jurisdiction." 109 S.Ct. at 2245. In 1974, 1976 and 1978, Congress enacted laws authorizing the use of special trial judges

in a variety of declaratory judgment cases, where the record was typically already fully developed in the administrative process and hence the special trial judge would not conduct a full trial, resolve disputed factual issues, or tangle with novel and complex legal issues.[20] Thus Congress authorized the Tax Court to deploy special trial judges to alleviate the burden imposed on the Tax Court by repetitious, narrow or minor tax matters that could keep the court from trying its more complex and challenging cases. *See* DuBroff at 351; H.R.Rep. No. 93-1280 at 332. *Cf. Gomez*, 109 S.Ct. at 2245 (Congress intended magistrates to "handle subsidiary matters to enable district judges to concentrate on trying cases").

The state of special trial judge jurisdiction in 1984 was, as the Tax Court has described it, that "the Chief Judge was authorized to assign to special trial judges *only* 'any declaratory judgment proceeding, any small tax case, and any other proceeding where the amount in dispute [did] not exceed $5,000.' " (A76) (Tax Court in *Samuels, Kramer*, quoting H.R.Rep. No. 98-432) (emphasis added). In 1984 Congress enacted what became § 7443A(b)(4), which allows the assignment to a special trial judge of "any other proceeding which the Chief Judge may designate." (A100). Congress deemed this addition to be a mere "technical change" meant to allow the assignment of cases "regardless of the amount in issue." H.R.Rep. No. 98-432 at 1568. There was absolutely no indication that subsection (b)(4) would now encompass major test cases, such as this tax shelter dispute, where the legal and financial issues are far more complex (and the precedential effect of the decision will be far more sweeping) than in the simple, almost administrative tax matters enumerated in § 7443A(b)(1)-(3).

It is incongrous to assume that Congress intended such a wholesale expansion of special trial judge jurisdiction when it enacted § 7443A(b)(4) after 15 years of measured, incremental

[20] *See* M.Garbis, P.Junghans, S.Struntz, *Federal Tax Litigation: Civil Practice & Procedure* ¶21.02[1] (1985).

and highly specific adjustment of that jurisdiction to include a variety of discrete, simple or minor tax matters.[21] Here, as in *Gomez*, a literal reading of the "any other proceeding" provision simply will not wash. The "carefully defined grant of authority to conduct trials" in "minor" cases "should be construed as an implicit withholding of the authority to preside" over the trial of a complex, major tax shelter case. *Gomez*, 109 S.Ct. at 2245.

B. Even If A Special Trial Judge May Hear A Complex Tax Case, He May Not Effectively Resolve It Subject Only To Deferential Tax Court Review.

The court below read (b)(4) to expand special trial judge jurisdiction dramatically to include power to preside over any and all conceivable cases, regardless of the subject matter or standard of review, so long as a regular Tax Court judge formally enters the decision in the record: "Our analysis begins and ends with the simple fact that the opinion in this case was issued by the Tax Court in the name of the Chief Judge." (A7).

[21] It would be especially implausible to make such an assumption against the backdrop of contemporaneous legislative developments involving similar subordinate or adjunct adjudicatory officers over in the Article III courts. In the period leading up to 1984, Congress had considered at length legislation governing the jurisdiction of federal magistrates and bankruptcy judges. Congress was well aware of the constitutional dangers of giving too much power to such officers under Article III. The 1979 amendments to the magistrate statute confined magistrate jurisdiction within elaborately specified consent and review requirements, in part to ensure that there would be no infringement of Article III. *See Gomez*, 109 S.Ct. at 2243-45. And in the years 1982 to 1984, Congress rewrote the rules for bankruptcy judge jurisdiction in the wake of this Court's decision in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). While the appointment of special trial judges by the Tax Court of course raises no issue under Article III, it is unlikely, given the lessons of the magistrate and bankruptcy debates, that Congress would have blithely granted a blank check to special trial judges without so much as a thought to its possible infirmity under the Appointments Clause. This Court in the past has been "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils," and should be similarly wary here. *Public Citizen*, 109 S.Ct. at 2572.

Such rigidly formal, literal-minded analysis did not satisfy this Court in *Gomez*, and it should not suffice here. This Court declined to endorse a broad reading of the catch-all provision in the Magistrates Act in *Gomez* because the "district court retains the power to assign to magistrates unspecified 'additional duties,' *subject only to conditions or review that the court may choose to impose*." 109 S.Ct. at 2245 (emphasis added). The lack of meaningful review of magistrate rulings under the expansive, literal reading of the Act urged by the government in *Gomez* was a major factor in this Court's rejection of a broad reading of the law. *See id.* at 2246-47. In particular, this Court repudiated the government's "meritless . . . contention" that "jury selection is among the pretrial matters that a magistrate may 'hear and determine,' subject to review only for mistakes that are clearly erroneous or contrary to law." *Id.* at 2247 n.28.

The standard under which special trial judge opinions and findings are reviewed likewise argues for a narrow reading of the "any other proceeding" language in § 7443A(b)(4). Under § 7443A(c), the Tax Court picks its own standard of review, and it is clear that, as in *Gomez*, the scrutiny imposed is no more searching than a "clearly erroneous" standard. Tax Court Rule 183(c) mandates that special trial judge factual findings "*shall be presumed to be correct*" by the Tax Court judge. (A92) (emphasis added). The only circuit court decision addressing this precise issue has held that special trial judge factual findings are reviewable, at most, under a "clearly erroneous" standard. *Stone* v. *Commissioner*, 865 F.2d 342, 344-47 (D.C.Cir. 1989).[22] As

[22] Contrary to the intimation of the court below (A7-8 n.8), the *Stone* decision has not been superseded by any supposed change in Tax Court practice. Although Tax Court Rules no longer require a special trial judge to file his report with the clerk of the Tax Court so that litigants may file exceptions to it before it is reviewed by a Tax Court judge, *Stone* never even cited, much less relied upon, those provisions of the old rules. Instead, the *Stone* court based its decision solely on what is now Tax Court Rule 183, the text of which has not changed. 865 F.2d at 345. *Stone* remains the law: the Tax Court must adopt the findings of a special trial judge unless clearly erroneous. The government in *Stone* was unable to identify even a single Tax Court decision manifesting a level of review more searching than the "clearly erroneous" standard. *Id.* at 347.

in *Gomez*, a catch-all provision like (b)(4)'s "any other proceeding" clause should not be interpreted to allow assignment of major, complex, precedent-setting tax disputes under such a deferential standard of review.

Indeed, the statutory provisions relating to Tax Court review of special trial judge reports indicate that Congress never authorized the Tax Court to assume a remote supervisory posture in (b)(4) cases such as the one at issue here. Section 7443A(c) authorizes the Tax Court to establish "such conditions and review as the court may provide" for the disposition by special trial judges of small tax cases and declaratory judgment actions assigned under subsections (b)(1), (2) or (3). (A100). No mention is made of the Tax Court enjoying similar power to set the standard for reviewing special trial judge reports under cases assigned pursuant to subsection (b)(4). Here, as in *Gomez*, it is "[s]ignificant[ ]" that Congress "did not identify" (b)(4) cases as those in which the Tax Court was empowered to establish the standard of review. 109 S.Ct. at 2246. "It is incongruous to assume that Congress" meant to give the Tax Court power to set that standard "yet failed even to mention that matter in the statute." *Id.* at 2246-47. The only plausible inference that can be drawn from this pointed omission in § 7443A is that Congress did not intend for Tax Court supervision of special trial judge findings and opinions in (b)(4) cases to be *appellate* in nature. Those cases were meant to be *decided* by the Tax Court *in the first instance*, not merely *reviewed* after a special trial judge heard the case and drafted the opinion.

The application of Tax Court Rule 183's deferential standard of review in this case is therefore beyond the power of the Tax Court. Congress did not give the Tax Court power to act as an appellate tribunal in (b)(4) cases, yet that is clearly what the Tax Court has done. The "clearly erroneous" standard of review mandated by Tax Court Rule 183(c) undoubtedly governs in all assignments to special trial judges, *see Stone* v. *Comm'r*, 865 F.2d at 345, 347, and this highly deferential

standard was expressly applied by the Tax Court in reviewing Special Trial Judge Powell's opinion in this case. (JA 9) (action on Powell's report will be taken "pursuant to Rule 183(c)").

Even assuming that Congress intended to allow special trial judges to preside over complex tax disputes with wide-ranging effect, such as this one, it is inconceivable that Congress meant to allow the Tax Court to adopt special trial judge opinions in (b)(4) cases wholesale, subject only to the deferential standard of review the Tax Court was empowered to establish with respect to (b)(1)-(3) cases.[23] It is simply no answer to say, as did the court below, that the Tax Court can be deemed to make its own decisions in (b)(4) cases, in compliance with the statute and congressional intent, because the decision in such cases is, ultimately, formally "issued by the Tax Court in the name" of a regular Tax Court judge. (A7). This exalts form over substance. In practice, the real standard applied by the Tax Court in (b)(4) cases may be even more deferential than the "clearly erroneous" standard.

This case is a perfect example of how special trial judges routinely do the Tax Court's work with only the most cursory supervision, if any. Findings of fact often conclusively decide tax litigation, as they did in this case, where the issue whether a particular transaction and the deduction claimed for it will be disallowed as a sham "is a question of fact reviewed under the clearly erroneous standard." (A8). Thus Special Trial Judge Powell's conclusion that petitioners' deductions were shams and that additional tax liabilities were owed was virtually binding on the Tax Court. That conclusion was reached after one of the longest trials in Tax Court history, a trial that generated a voluminous record and that raised complex and unsettled issues of tax law. Yet, as the court below found, "the special trial judge filed his report on October 21, 1987" and the "Chief

[23] *Cf. Gomez*, 109 S.Ct. at 2246 ("Even assuming that Congress did not consider *voir dire* to be part of trial, it is unlikely that it intended to allow a magistrate to conduct jury selection without procedural guidance or judicial review.").

Judge adopted this report as the Tax Court's opinion and formally filed the decision that same day" (A7) — thereby deciding test cases meant to determine the fate of over 3,000 similar tax cases involving billions of dollars.

No presumption of administrative regularity can convert this into meaningful review. The Fifth Circuit virtually conceded that the Tax Court review in this case was but a rubber stamp, noting explicitly the "short time span" (A8) — a few hours at the very most — in which the supposed review of the 9,000 page transcript and 3,000 exhibits was accomplished. For the court below to treat this as meaningful review is truly an arid exercise in empty formalism. Although allowing special trial judges to resolve minor tax matters — subject to what review the Tax Court deems appropriate — may comport with the congressional design under § 7443A(b)(1)-(3), the assignment of this complex and far-reaching case to a special trial judge for effectively final resolution is inconsistent with the narrow grant of authority in § 7443A(b)(4) when read in its proper context.

II. THE APPOINTMENT OF SPECIAL TRIAL JUDGES BY THE CHIEF JUDGE OF THE TAX COURT VIOLATES THE APPOINTMENTS CLAUSE.

If § 7443A(b)(4) is read, as it was below, to permit a special trial judge to preside over the trial of *any* Tax Court case, then there is no way of avoiding the question whether the Tax Court's appointment of special trial judges comports with the Constitution. Under the Appointments Clause, Art. II, § 2, cl. 2., the power to appoint inferior officers may be vested by Congress "in the President alone, in the Courts of Law, or in the Heads of Departments." (A99). But the Article I Tax Court is not a "Court[ ] of Law" within the meaning of that clause, nor is its Chief Judge a "Head[ ] of Department."

The Appointments Clause must be understood in light of its history, which reveals the Framers' plan to prevent the widespread diffusion of appointment power throughout the federal government, and to limit congressional discretion to vest power to appoint inferior officers to two groups of officials: on the one hand, the "President himself" and his "Heads of Departments," who are accountable to the President's own electoral constituency and who enjoy political and constitutional checks preserving their independence from Congress; and, on the other hand, the "Courts of Law," who are protected by the tenure and salary provisions of Article III.

As James Madison recognized, the appointment of executive officers was "the most delicate part in the organization of a republican government" and "the most difficult to establish on unexceptionable grounds." 3 *The Debates In The Several State Conventions On The Adoption Of The Federal Constitution* 374 (J. Elliot ed. 1854). The "manipulation of official appointments" had long been the American revolutionary generation's greatest grievance against executive power, G. Wood, *The Creation Of The American Republic 1776-1787* 79 (1969), because "the power of appointment to offices" was deemed "the most insidious and powerful weapon of 18th century despotism." *Id.* at 143. These concerns were addressed in Philadelphia in 1787 by carefully husbanding the appointment power to limit its diffusion, and by dividing the power to appoint principal federal officers (Ambassadors, Ministers, Heads of Departments, Judges) between the Legislative and Executive Branches. *See Buckley* v. *Valeo*, 424 U.S. 1, 129-31 (1976). Even with respect to "inferior Officers," the Framers granted Congress only limited authority to devolve appointment power upon the President, the Courts of Law, and the Heads of Departments.

That limit cannot "be read as merely dealing with etiquette or protocol in describing 'Officers of the United States.'" *Buckley*, 424 U.S. at 125. The "drafters had a less frivolous purpose in mind." *Id.* They were determined to limit the distribution of the power of appointment in order to keep that justifiably fearsome power in check. To that end, the Constitu-

tional Convention rejected Madison's complaint that the Appointments Clause did "not go far enough": Madison argued that "Superior Officers" other than "Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 *Records of the Federal Convention of 1787* 627-28 (M. Farrand ed. 1966).[24]

The Appointments Clause was unanimously approved in its original, limited form, *id.* at 628, and it has served the Republic well for two centuries. When the practical demands of staffing a burgeoning bureaucracy with a proliferation of offices have been felt, Congress has, "as they think proper," Art. II, § 2, cl.2, lodged the appointment power in the politically accountable President or in his immediate subordinates, the Heads of Departments, who serve at the President's pleasure.

Congress has vested appointment power in the Judicial Branch when independence from Executive and Legislative manipulation or pressure has been deemed essential — as in the appointment of inferior judicial officers such as magistrates and bankruptcy judges, or the appointment of executive officers whose duties might engender a conflict of interest if they were appointed by the President or a Head of Department.[25]

The government apparently considers this degree of flexibility insufficient to meet modern conditions, and essentially urges this Court to amend the Appointments Clause so that the appointment power the Framers guarded so jealously can be conferred not just on the Courts of Law and the Heads of Departments, but also on the chief officers of legislative courts. The government thus asks this Court to condone the very

[24] The brief debate on this provision of the Appointments Clause is reprinted in the Appendix at A94-95.

[25] *See, e.g., Morrison* v. *Olson*, 487 U.S. 654, 677 (1988) (independent counsel appointed by special panel of federal Court of Appeals and charged with investigating and prosecuting crimes by President's closest advisors); *Ex Parte Siebold*, 100 U.S. 371, 397 (1879) (election supervisors appointed by federal district courts to police federal elections during Reconstruction); Judiciary Act of Sept. 24, 1789, ch.20, §§ 28-29, 1 Stat. 73, 88 (1789) (Judiciary empowered to appoint U.S. Marshals whenever presidentially appointed Marshal has conflict of interest).

diffusion of appointment power that the Framers intended to forbid. Such a change is both unwarranted and unconstitutional.

A. A Special Trial Judge Is An "Inferior Officer" Whose Appointment Must Conform To The Appointments Clause.

The Appointments Clause governs the appointment of "all persons who can be said to hold an office under the government." *Buckley* v. *Valeo*, 424 U.S. 1, 125 (1976). As the United States Tax Court held in the related *Samuels, Kramer* case, its own special trial judges are indeed inferior officers of the United States, not mere employees. (A79-80). That holding cannot plausibly be contested.

A special trial judge plainly fits this Court's contemporary definition of an "officer" for Appointments Clause purposes, namely, an "appointee exercising significant authority pursuant to the laws of the United States," *Buckley*, 424 U.S. at 126. As set forth above, page 7, special trial judges do a substantial portion of the Tax Court's work and exercise virtually the same powers as presidentially-appointed Tax Court judges. A special trial judge is vested with all "incidental authority . . . necessary for the conduct of trials or other proceedings." Tax Court Rule 181. As interpreted below (A7), 26 U.S.C. § 7443A allows a special trial judge to preside over *any* Tax Court case, to formally enter the decision in many minor or limited tax matters, and to issue findings and opinions that may be adopted verbatim by the Tax Court without meaningful review even in the most complex, significant and far-reaching cases, as they were here.

Holding a Tax Court special trial judge to be an "inferior Officer" also comports with the venerable definition of "officer" formulated by Chief Justice Marshall for purposes of construing the Appointments Clause in *United States* v. *Maurice*, 26 Fed.Cas. 1211, 1214 (No.15,747) (1823): an

officer is one who performs duties that are continuing and that are defined by laws or rules prescribed by government rather than by contract. The term "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary." *United States* v. *Germaine*, 99 U.S. (9 Otto) 508, 511-12 (1879). *See also Auffmordt* v. *Hedden*, 137 U.S. 310, 326-27 (1890). The office of special trial judge is created by statute, it is filled by "appointment," and the duties appurtenant thereto are spelled out in statute and Tax Court rules. *See* 26 U.S.C. § 7443A (A100); Tax Court Rules 180-83.

Special trial judges in the Tax Court are at least as much "officers" as federal magistrates in the Article III District Courts, who are deemed inferior officers whose appointment (by the Article III judiciary) must comport with the Appointments Clause. *Pacemaker Diagnostic Clinic* v. *Instromedix*, 725 F.2d 537, 545 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984). Indeed, special trial judges enjoy greater power under federal law than do magistrates, since their trial rulings are unreviewed and even their ultimate findings and opinions are presumed correct. In contrast, magistrates may preside over and enter final judgment in a civil trial only with the consent of the parties, 28 U.S.C. § 636(c)(1), and their rulings on dispositive motions, their findings of fact and their conclusions of law are all subject to *de novo* review if any party files objections. *See, e.g.*, *LoConte* v. *Dugger*, 847 F.2d 745, 750 (11th Cir.) (reviewing district judge must actually read transcript or listen to tape recordings of testimony magistrate heard), *cert. denied*, 109 S.Ct. 397 (1988). Accordingly, a special trial judge is an "inferior Officer."[26]

[26] Indeed, under this Court's decision in *Morrison* v. *Olson*, 487 U.S. 654, 671-73 (1988), it is even arguable that a special trial judge is a "principal" rather than an "inferior" officer. Under the expansive reading of § 7443A adopted below, a special trial judge's "duties" are not "limited," *id.* at 671 (he may exercise all the powers of a Tax Court judge both before and during trial); his "jurisdiction" is not "limited," *id.* at 672 (he can preside over and decide *any* case, subject only to "clearly erroneous" review); and his "office" is not "limited in tenure," *id.* (he is a full-time adjudicative officer, not someone designated on an *ad hoc*, temporary basis to "accomplish a single task, and when that task is over the office is terminated," *id.*). If a special trial judge is a principal rather than an inferior officer, reversal of the judgment below is mandated, because all principal officers must be appointed by the President with the advice and consent of the Senate. *See* Art. II, § 2, cl.2.

B. The Chief Judge Of The Tax Court Is Not A "Head Of Department" Within The Meaning Of The Appointments Clause.

Treating the Article I Tax Court as a "Department" within the meaning of the Appointments Clause, and its Chief Judge as the "Head" of that "Department," would both defy the plain meaning of the Constitution's text and fly in the face of Congress' decision to transform the Tax Court from an executive agency into an Article I legislative court. The only way to reach such an unnatural conclusion would be by a simplistic and fallacious process of elimination: since the Tax Court is not part of the Legislative Branch, nor a "Court of Law," see Part II.C., *infra*, it must be a "Department" in the Executive Branch. Any such argument must be rejected in light of the legislative history of the Tax Court and a hundred years of consistent judicial interpretation of the Appointments Clause.

1. History of the Tax Court.

Classifying the Tax Court as an Executive "Department" would certainly come as a surprise to Congress, which enacted legislation in 1969 with the express purpose of "making the Tax Court an Article I court rather than an executive agency." S.Rep. No 91-552 at 303; DuBroff at 213. See page 2 *supra*. Congress deemed it "anomalous to continue to classify" the Tax Court with executive agencies, S.Rep. No. 91-552 at 302, considered it burdensome and inappropriate to have the Tax Court subjected to the strictures of the Administrative Procedure Act, *see* Dubroff at 191-92, 213, 215 & n.351, and questioned whether it was "appropriate for one executive

agency [the pre-1969 Tax Court] to be sitting in judgment on the determinations of another executive agency [the IRS]." *Id.* Surely a federal court may not override Congress' considered judgment and redesignate as an Executive "Department" an entity that Congress explicitly distanced from Executive control and reconstituted as an Article I legislative court.[27]

2. Interpretation of the Constitution's Text.

Even it were assumed arguendo that the Tax Court must be located within the Executive Branch, it would not follow that the Tax Court was an Executive Department within the meaning of the Appointments Clause. The Appointments Clause limits the vesting of appointment power within that Branch to the "Heads of Departments," and not every institutional entity within the Executive Branch is a Department.

The Departments of the United States Government are identified by statute, and the list does not include the Tax Court.[28] This Court has consistently held for more than a century that the term "Department" refers only to those " 'part[s] or divi-

[27] In *Germaine*, this Court noted that the phrase "Head of Department" in the Appointments Clause must be read in conjunction with the Opinion Clause of Art.II, § 2, cl.1: the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments." 99 U.S. at 511. Thus if the Chief Judge of the Tax Court were the "Head" of a Department, he could be compelled to provide advisory opinions to and perform other analytical and investigative tasks for the President. Yet one of the reasons for transforming the Tax Court into an Article I tribunal in 1969 was to eliminate the need for that tribunal to respond to Executive inquiries pertaining to executive supervisory or budgetary authorities, a task that was cumbersome and often irrelevant to the Tax Court's adjudicative duties. *See* Dubroff at 190 & n.177.

[28] Under 5 U.S.C. § 101, the Executive "Department[s]" are: State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education and Veterans Affairs. Significantly, three of these Departments — Energy, Education and Veterans Affairs — have been added by Congress since 1969, the year Congress changed the status of the Tax Court to an Article I court. Had Congress meant to establish the Tax Court as a Department rather than an Article I legislative court, it surely would have amended 5 U.S.C. § 101, as it has every other time it has added a new Department to the executive branch.

sion[s] of executive government, as the Department of State, or of the Treasury,' " expressly "creat[ed]" and "giv[en] . . . the name of a department" by Congress. *United States* v. *Germaine*, 99 U.S. 508, 510-11 (1879). *See also Burnap* v. *United States*, 252 U.S. 512, 515 (1920) (Brandeis, J.) ("The term head of a Department means . . . the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet."). Accordingly, the term "Head of Department" means "members of [the President's] cabinet," not mere "commissioners and bureau officers." *Germaine*, 99 U.S. at 511.

This reading of the term "Heads of Departments" in the Appointments Clause is buttressed by the understanding of that term as it appears in other provisions of the Constitution.[29] For example, in *Germaine* this Court noted that the phrase "Head of Department" in the Appointments Clause has the same meaning as the reference to the "principal Officer in each of the executive Departments" in the Opinion Clause of Art.II, § 2, cl.1. 99 U.S. at 511. See note 27 *supra*. This latter cognate phrase also appears in Section 4 of the 25th Amendment, which empowers the Vice President, together with a majority of the "principal officers of the executive departments," to unseat the President when they deem him incapacitated.[30] The hearings on the 25th Amendment make clear that the term "Department" denotes only the great, Cabinet-level executive entities: "[O]nly officials of Cabinet rank should participate in the decision as to whether presidential inability

[29] The Constitution repeats many legal terms of art in its different provisions, and they are naturally understood to mean the same things each time. For example, the "Bill of Attainder," "ex post facto Law" and "Title of Nobility" mentioned in Art. I, § 9 are the same as the Bill, Law and Title denoted by those same terms in Art. I, § 10.

[30] "Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit . . . their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President." 25th Amendment, § 4.

exists . . . The intent . . . is that the presidential appointees who direct the 10 executive departments named in 5 U.S.C. § 1, or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate . . . in determining inability." H.R.Rep. No. 203, 89th Cong., 1st Sess. 3 (1965). *See also id.* at 13; S.Rep. No. 66, 89th Cong., 1st Sess. 2-3, 13 (1965). Whether inscribed with a quill pen in 1787 or a typewriter in 1965, the Constitution's references to Executive "Departments" have consistently been limited to the great, Cabinet-level organs of government.

3. The Framers' Understanding of "Department."

This Court's settled interpretation of the Appointments Clause is entirely consistent with the history of that clause and with the Framers' intent. The Framers themselves interpreted "Heads of Departments" just as narrowly as this Court has for over a hundred years, and that is precisely why James Madison complained that the clause "did not go far enough" because it did *not* allow appointment power to be vested in "Superior Officers" in the Executive Branch who were not "Heads of Departments." See pages 25-26 *supra*. Yet this was one battle that Madison lost; this provision of the Appointments Clause was unanimously approved despite his objection.

The government thus asks this Court to rewrite the Appointments Clause to permit the very diffusion of appointment power that the Framers intended to forbid. If this Court were to disregard the language of the Clause, the history of its adoption, the Framers' understanding of it, and a century of consistent judicial interpretation, the Court would launch the appointment power down a very treacherous slope. For if all entities in government not located within the Legislative or Judicial Branches can be vested with appointment power as "Departments," then there is no limiting principle left to the Appointments Clause. The class of officeholders who could be vested

with the power to appoint inferior officers of the United States would ther be expanded to the outer limits of the Capital Beltway. If such power can be vested in the Tax Court on the theory that it, too, is an Executive "Department," then that power can be conferred on every "commission," "administration," "authority," "agency," "panel," "task force," "board," "bureau" and "legislative court" in the federal government.

C. The Tax Court Is Not A "Court Of Law" Within The Meaning Of The Appointments Clause.

The alternative proposition that the Tax Court is a "Court of Law" should likewise be rejected. The fact that the Tax Court may be an Article I court does not *ipso facto* make it a "Court of Law" within the meaning of the Appointments Clause. That clause must be read in the context of the entire Constitution. As the Solicitor General formally conceded in his brief in the related *Samuels, Kramer* case, an Article I court cannot be a "Court of Law" for Appointments Clause purposes, because the Framers used the term "the Courts of Law" in the Clause to refer to those courts created and existing under Article III as part of the Judicial Branch.

1. The Constitution's Text.

Understanding the Framers to have meant "Courts" in the Appointments Clause to denote the same institutions they described as "Courts" in Art. III, § 1, is not only the most natural reading of the Constitution's text, but also the reading suggested by this Court. Just as our understanding of "Department" is informed by how that term is used elsewhere in the Constitution, see Part II.B. *supra*, so the term "Courts of Law" is illuminated by cognate provisions of the Constitution. In *Buckley* v. *Valeo*, this Court held that the Appointments Clause must be read in light of Article III's grant of judicial power. After reciting the Constitution's three grants of Legislative, Executive and Judicial power, including Art. III, § 1's declara-

tion that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," the Court reasoned that "[i]t is in the context of these cognate provisions of the document that we must examine the language of Art. II, § 2, cl. 2." 424 U.S. at 124. Article III courts are the only "Courts" mentioned by name in the Constitution, and they must be the same as the "Courts of Law" referred to in the Appointments Clause.

When this Court restated the command of the Appointments Clause in *Buckley*, the terms it chose were significant: "Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by *the Judiciary*." 424 U.S. at 132 (emphasis added). *See also Morrison* v. *Olson*, 487 U.S. at 670 (quoting *Buckley*). In the context of the Federal Constitution generally, and in particular with respect to the Appointments Clause, the term "Judiciary" has always been understood to refer exclusively to those judges appointed in accord with Article III.[31] There is no reason to depart from this precedent and to reinterpret "Court of Law" to mean any adjudicative tribunal in the federal government.

2. The Specialized Nature of the Tax Court.

Although the Tax Court is undeniably an adjudicative forum, not all "courts" are created equal under the Appointments Clause. Even if this Court were writing on a blank slate, there are reasons not to deem "Court of Law" to include Article I legislative tribunals. The Tax Court is not a "Court of Law" —

[31] *See, e.g., Buckley*, 424 U.S. at 132; *Marathon Pipe Line*, 458 U.S. at 70 n.25. *See also Buckley*, 424 U.S. at 128 (Appointments Clause allows power to be vested in "co-equal Judicial and Executive Branches"); *Morrison* v. *Olson*, 487 U.S. at 677 (appointment power can be vested in "Executive Branch" and "Judicial Branch"); *id.* at 678-79 ("Courts of Law" discussed exclusively in terms of Article III courts); *In the Matter of Koerner*, 800 F.2d 1358, 1367 (5th Cir. 1986) (discussing Appointment Clause in terms of "executive or judicial branches").

"[i]t has no jurisdiction to exercise the broad common law concept of 'judicial power' invested in courts of general jurisdiction by Article III of the Constitution." *Burns, Stix Friedman & Co.* v. *Comm'r*, 57 T.C. 392, 396 (1971).[32] It is rather a "public rights" tribunal that adjudicates matters "arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'" *Marathon*, 458 U.S. at 67-68 (quoting *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932)). This Court's consistent distinction between "public rights" tribunals "'with special competence in the relevant field'" and "'a federal court of law'" of general jurisdiction, *Granfinanciera, S.A.* v. *Nordberg*, 109 S.Ct. 2782, 2795 & n.9 (1989), buttresses the proposition that the Tax Court is not a "Court of Law" within the meaning of the Appointments Clause.[33]

[32] "It does not follow from the fact that the Tax Court is now an Article I 'legislative court' that it possesses . . . the full judicial power, extending to 'all cases, in law and equity,' that is vested in 'constitutional courts' created by Congress under Article III." *Continental Equities, Inc.* v. *Comm'r*, 551 F.2d 74, 84 (5th Cir. 1977). *See also Lasky* v. *Comm'r*, 235 F.2d 97, 99 (9th Cir. 1956) (rejecting argument that Tax Court "is 'like other courts' and hence as a *court* has . . . '*inherent* power[s]'") (emphasis in original), *aff'd per curiam*, 352 U.S. 1027 (1957); *West* v. *Comm'r*, 150 F.2d 723, 727 (5th Cir.) (Tax Court "differs from the old Court of the Exchequer in England in that the latter was a judicial court of law and equity with exclusive jurisdiction in fiscal matters."), *cert. denied*, 326 U.S. 795 (1945).

Indeed, it would be strange to consider the Tax Court a "Court of Law" since Congress has forbidden the Tax Court from requiring that those who practice before it be admitted to the practice of law. *See* 26 U.S.C. § 7452 ("No qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling.").

[33] Any comparison of specialized federal legislative courts to the courts established in the territories and the District of Columbia, and the power those courts have sometimes been given to appoint their own clerks, would be wholly inapposite. For it has long been settled that the Constitution does not require that the separation, checks and balances mandated at the federal level, "where laws of national applicability and affairs of national concern are at stake," be replicated at the level of territorial and District of Columbia governments. *Palmore* v. *United States*, 411 U.S. 389, 407-08 (1973) (federal separation of powers "give[s] way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas"). As Chief Justice Marshall first

3. The Tax Court's Relationship with Congress.

Article I courts also differ from Article III courts in their relationship with Congress. Perhaps the most important Appointments Clause imperative is that the power to appoint federal officers be kept out of legislative hands. *See Buckley* v. *Valeo*, 424 U.S at 129-31; *Morrison* v. *Olson*, 487 U.S. at 685-86. Just as the President and the Heads of Departments may fend off congressional overreaching by virtue of their independent political constituency and the checks on legislative power that the Executive enjoys under the Constitution, so the tenure and salary protections of Article III provide the Judiciary with the necessary independence from the Legislative Branch.

No such guarantees exist with respect to the Article I Tax Court, toward which Congress often displays an almost proprietary relationship. Despite its title and adjudicative functions, the Tax Court is considered by many to be "a legislative body performing judicial functions," DuBroff at 215, *cf. Bowsher* v. *Synar*, 478 U.S. 714, 730-31 (1986) (relying on academic study of GAO to conclude it was subject to congressional influence); or "an independent judicial body in the legislative branch," Office of the Federal Register, Nat'l Archives and Records Admin., *The United States Government Manual* 76 (1989/1990) (official government manual describing Tax Court's status since 1969). *Cf. Bowsher* v. *Synar*, 478 U.S. at 744 & n.6 (Stevens, J., concurring in the judgment) (relying on statutes and reports describing GAO as part of legislative branch); *see also id.* at 730-31 (opinion of the Court) (same).

explained in *Sere and Laralde* v. *Pitot*, 10 U.S. (6 Cranch) 332 (1810), irrespective of the Constitution, Congress may give a territorial government "a legislative, an executive, and a judiciary with such powers as it has been their will to assign those departments respectively." *Id.* at 337 (emphasis added). *See also Glidden* v. *Zdanok*, 370 U.S. 530, 545-46 (1962) ("the freedom of the territories to dispense with protections deemed inherent in a separation of governmental powers was . . . fully recognized"); *O'Donoghue* v. *United States*, 289 U.S. 516, 545-48 (1933) (courts in District of Columbia may mingle Art. III power with nonjudicial administrative and executive functions); *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (Art.III separation of powers "limitation does not extend to the territories").

There is no limiting principle to the argument that practical necessity or administrative convenience requires that the Tax Court be allowed to appoint special trial judges, as the Tax Court's holding in the *Samuels, Kramer* case makes plain. The Tax Court there held that Congress may vest federal appointment power in any "lawfully created government body" *even if* that body does "not fit within the terms 'Heads of Departments' or 'Courts of Law.'" (A86). Such a notion simply cannot be reconciled with the Constitution. If the term "Courts of Law" is expanded to embrace the Tax Court, then Congress will be free to vest appointment power in every legislative court or other adjudicatory body in the federal government.

D. Reading The Appointments Clause To Preclude Tax Court Appointment Of Special Trial Judges Will Cause The Federal Government At Most Minimal Disruption.

Even if Tax Court appointment of special trial judges were regarded as practical, that would not make it constitutional. "There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided." *INS* v. *Chadha*, 462 U.S. 919, 963 (1983) (striking down, for violation of the Presentment and Bicamerality requirements of Art. I, hundreds of one-house legislative veto statutes despite half a century of accepted use). Fortunately, no choice between practicality and the Constitution is posed here, for invalidating Tax Court appointment of special trial judges would cause little inconvenience for the federal government.

First, all that need happen in this case is a remand for trial before a regular tax court judge. Moreover, there need be no concern that the relief petitioners seek might disable the Tax Court generally, for the court will continue to function and the

constitutional flaw could be easily remedied. Upon invalidation of the current method of appointing special trial judges, Congress could simply expand the Tax Court to include additional judges to be appointed in accord with the Appointments Clause as are the current Tax Court judges.[34] This was the route Congress chose when it changed the Claims Court from an Article III court to an Article I tribunal in 1982.[35] Alternatively, the special trial judges could be appointed as inferior officers by "the President alone." Art. II, § 2, cl.2. Either resolution would be practicable and, more importantly, consistent with the narrow scope and most natural reading of the Appointments Clause.

Second, confining appointment of inferior officers to the "Heads of Departments" and the "Courts of Law" as required by the Appointments Clause would pose no significant disruption to the way in which seemingly similar positions elsewhere in the federal government are filled, because virtually all other adjudicatory officers and agents in the federal government are different from Tax Court special trial judges in significant ways.

The appointment power of the Article III Judiciary (who are undoubtedly "Courts of Law") is unquestioned; so, for example, federal magistrates and bankruptcy judges who serve as adjuncts to Article III courts are completely unaffected by this case. See 28 U.S.C. §§ 152, 631(a). The appointment power that the Heads of the Executive Departments may wield pursuant to congressional grant is likewise unquestioned.

[34] Even this step may not be necessary, because the inventory of pending Tax Court cases declined 40% between 1986 and 1990. See Interview with Arthur L. Nims, III, Chief Judge, U.S. Tax Court, 10 A.B.A. Section of Taxation Newsletter, No. 2, 34-37 (Winter 1991). The Tax Court expects that its docket will stabilize at this new, lower level. *Id.*

[35] *See* Pub.L. 97-164, Title I, § 121(b), 96 Stat. 34 (1982). The offices of the fifteen Claims Court commissioners (appointed by the Claims Court when it was an Article III tribunal) were eliminated. But the Court itself was expanded from seven to sixteen judges to compensate for the increased workload. *See also* 28 U.S.C. § 171.

Administrative law judges ("ALJs") who serve in Executive Branch agencies and independent commissions[36] are likewise unaffected by the outcome of this case, for they are hired through the competitive civil service and are expressly and aptly designated "employees," rather than inferior officers, by the relevant legislation and rules.[37] Other commission and agency staff members are likewise employees, such as, for example, the "officers, attorneys, examiners, and other experts" whom the Securities and Exchange Commission is "authorized to appoint and fix the compensation of," often "subject to the civil-service laws." 15 U.S.C. § 78d(b).[38] Such personnel, unlike special trial judges, are not "officers" within the meaning of the Appointments Clause because their offices, positions, duties, functions and compensation are left up to the agencies (or the Office of Personnel Management) rather than "established by law." See Part II.A. *supra*.[39]

[36] *See, e.g., CFTC* v. *Schor*, 478 U.S. 833, 838 (1986) (proceedings before CFTC adjudicated by ALJs).

[37] The Administrative Procedure Act expressly denominates the ALJs "presiding *employees*." 5 U.S.C. §§ 554(d), 556(b) & (c), 557(b) (emphasis added). See also 5 C.F.R. § 930.201(b) (ALJ is a competitive civil service position). ALJs take competitive civil service exams, 5 U.S.C. § 1104(a)(2); are paid according to civil service pay scales, 5 U.S.C. §§ 5335(a)(B), 5372; and are hired, fired, and transferred among agencies pursuant not to the whims of the agency and commission heads but to the regulations and authority of the Office of Personnel Management, 5 U.S.C. §§ 1305, 3344, 7521; 5 C.F.R. § 930.203a(a).

[38] The vast expansion in the size of the federal bureaucracy since the Republic's birth has come almost entirely in the form of a proliferation of inferior executive officers appointed by the President or his Cabinet Secretaries and a swelling of the "roster of minor employees." *United States* v. *Mitchell*, 89 F.2d 805, 808 (D.C.Cir. 1937). This case does not affect the selection of any of these officers or workers, for the latter are not governed by the Appointments Clause while the former are appointed consistent with it.

[39] *See, e.g., United States* v. *Mitchell*, 89 F.2d at 808 (FCC attorneys are "employees of government who are not 'officers,' a class of employees not intended to be and not required to be appointed by the President or by a Head of Department"). *Cf. United States* v. *Maurice*, 26 Fed.Cas. at 1214-15 ("officers" occupy "offices" specifically created by Congress; a statute directing Secretary of War to prepare regulations defining duties and powers of enumerated personnel "cannot be construed to extend to the establishment of offices").

The only officeholders other than special trial judges whose appointment would be thrown into doubt by a reversal in this case are statutorily authorized and defined officers appointed by other Article I tribunals such as the Claims Court. As to this category of officers, which in any event is quite limited in number, the Executive Branch itself has already identified the constitutional problem. President Bush himself declared in a recent signing statement that the Appointments Clause had been violated when Congress authorized the Claims Court to appoint special masters to hear and effectively decide claims arising under the National Vaccine Injury Compensation Program. 42 U.S.C. §§ 300aa-11, 300aa-12(a). The office, tenure, compensation, jurisdiction and duties of these special masters — like those of Tax Court special trial judges — are carefully defined by statute. *See* §§ 300aa12(c) & (d). The special masters' proposed findings of fact and conclusions of law must be presumed correct by the Claims Court — as Rule 183(c) requires with respect to special trial judge factual findings — and may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 300aa-12(e)(2)(B).

The vaccine special masters, like Tax Court special trial judges, are inferior officers of the United States whose method of appointment violates Article II, § 2 because the Claims Court, like the Tax Court, is neither a "Department" nor a "Court of Law." As the President himself noted upon signing the bill creating the vaccine masters: the bill "vest[s] significant authority pursuant to the laws of the United States in persons whose appointment and removal are inconsistent with the requirements of Article II . . . ."[40] The government has admitted that its analysis of the Appointments Clause in the Fifth Circuit below cannot be reconciled with this formal statement by the President that Article I courts cannot wield appointment power under Art. II, § 2, cl.2. (*See* A102-03).

[40] Statement of the President on Signing the Omnibus Budget Reconciliation Act of 1989, 25 Weekly Comp. of Pres. Docs. 1970-1 (Dec. 19, 1989). Pertinent portions of the statement are reprinted in Appendix G. (A103).

Interpreting the Appointments Clause to bar Article I courts from appointing inferior officers would thus have only the slightest impact on the federal government's operations. In stark contrast, the reinterpretation of the Appointments Clause urged by the government and amicus would allow the diffusion of appointment power throughout the breadth and depth of the federal bureaucracy, to the point where just about the only federal officers who could not be vested with power to appoint inferior officers would be the Members of Congress.

III. "CONSENT" TO THE ASSIGNMENT TO THE SPECIAL TRIAL JUDGE BELOW CANNOT AND DID NOT WAIVE ANY CHALLENGE TO THE APPOINTMENT OF THAT JUDGE UNDER THE APPOINTMENTS CLAUSE.

Although the Appointments Clause issue was briefed and argued by both parties below, the Fifth Circuit declined to reach it, holding that, "[b]y consenting to the assignment of their case at the time it was made, the Taxpayers waived this objection." (A8 n.9). This ruling cannot be reconciled with the Fifth Circuit's simultaneous decision to decide petitioners' objection to the statutory authority of special trial judges, which is unchallenged on this appeal. If a mere statutory objection to the assignment of a special trial judge to this case "may be raised for the first time on appeal" because it "is, in essence, an attack on the subject matter jurisdiction of the special trial judge" (A7), then "*[a] fortiori* is this so when the challenge is based on nonfrivolous constitutional grounds," *Glidden* v. *Zdanok*, 370 U.S. 530, 536 (1962), and the objection goes to the authority of the Tax Court even to appoint such an officer. No meaningful distinction can be drawn between proceedings void for lack of jurisdiction and those void for lack of a properly appointed adjudicator. As this Court explained last year in *Burnham* v. *Superior Court*, 110 S.Ct. 2105 (1990):

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books . . . [and was] [t]raditionally . . . embodied in the phrase *coram non judice*, "before a person not a judge" — meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment.

Id. at 2109 (emphasis in original).[41] Even if such a distinction could be drawn, the petitioners' consent to the assignment to a special trial judge below should not bar this Court from reaching the merits of petitioners' constitutional objection.

A. This Court May Reach And Decide These Constitutional Objections Even Though They Were Not Raised Or Considered In The Tax Court Below.

As Justice Harlan wrote in *Glidden* v. *Zdanok*, 370 U.S. 530 (1962), even "the disruption to sound appellate process entailed by entertaining objections not raised below" is "plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Id.* at 536.[42] In *Glidden* this Court expressly included Appointments Clause objections to judicial officers in the category of structural constitutional objections that should be considered on appeal regardless of whether they were ruled upon below:

> [I]n *Lamar* v. *United States*, 241 U.S. 103, 117-18, the claim that an intercircuit assignment . . . usurped the presidential appointing power under Art. II, § 2, was heard here and determined upon its merits, despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review.

370 U.S. at 536. *See also id.* at 539-40 (considering Appointments Clause argument not raised until hearing in this Court). The government has already conceded that *Glidden* and *Lamar* "stand for the proposition that the Court has subject matter jurisdiction to reach the merits of a constitutional claim not raised by the parties below." Opp.Br. at 17 n.13. In this case the Appointments Clause issue was raised below and briefed by both parties in the Court of Appeals. This issue has cast doubt on the legitimacy of Tax Court assignments to special trial judges and spawned division within the Executive Branch. This Court has already granted certiorari and the issue has been fully ventilated by the parties. If the statutory issue does not resolve the case in petitioners' favor, the Court should now decide the second question presented.

B. Challenges Based On The Appointments Clause Are Not Waivable By The Consent of the Parties, For That Clause Protects The Constitution's Structural Separation Of Powers, Not The Parties' Personal Rights.

The Fifth Circuit's waiver ruling is in any event plainly incorrect under this Court's decisions holding that an argument

[41] Compare *Lamar* v. *United States*, 241 U.S. 103, 117-18 (1916), where the argument that this Court considered, even though it was waived below and was raised, for the first time, in a supplemental brief in this Court, was that the trial court had no jurisdiction — indeed, that the trial court did not even properly *exist* — because the judge had been judicially assigned from another circuit in "usurp[ation] [of] the power of appointment and confirmation vested by the Constitution in the President and Senate."

[42] When the law or regime at issue "is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity. *A fortiori* is this so when the challenge is based upon nonfrivolous constitutional grounds." *Glidden*, 370 U.S. at 535-36. The constitutional legitimacy of Tax Court appointment of its special trial judges certainly concerns the "proper administration" of the Tax Court's "judicial business," and petitioners' Appointments Clause argument is anything but "[ ]frivolous." Even more important, petitioners' "earliest practicable opportunity" to press their constitutional objection was in the Fifth Circuit, for not until the Tax Court had adopted verbatim Special Trial Judge Powell's opinion did it first become apparent that petitioners would be denied the *de novo* review they anticipated when they accepted the mid-trial reassignment to Judge Powell.

premised on the Constitution's structural separation of powers is not a matter of personal rights and therefore is not waivable. A constitutional provision safeguarding a "personal right," such as "Article III's guarantee of an impartial and independent federal adjudication[,] is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *CFTC* v. *Schor*, 478 U.S. 833, 848-49 (1986). But if a provision "also serves as 'an inseparable element of the constitutional system of checks and balances,'" it cannot be waived. *Id.* at 850. *See also Pacemaker Diagnostic Clinic* v. *Instromedix*, 725 F.2d at 543-44 (per Kennedy, J.) ("The component of the separation of powers rule that protects the integrity of the constitutional structure, as distinct from the component that protects the rights of the litigants, cannot be waived by the parties."). When a

> structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limits imposed by Article III, § 2. . . . [N]otions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.

CFTC v. *Schor*, 478 U.S. at 850-51.[43] Indeed, such structural objections will be heard and decided even where the objecting

[43] Accordingly, this Court reached and decided the structural Article III issue in *Schor* even though "Schor indisputably waived any right he may have possessed" to an Article III tribunal by invoking the jurisdiction of the CFTC, seeking to have the suit in the alternative Art. III forum dismissed, and "expressly demand[ing]" that the case — including the counterclaim at issue — proceed before the CFTC. 478 U.S. at 849. *A fortiori*, the Court should decide the constitutional separation of powers issue presented here, where the petitioner consented to trial before a special trial judge under duress in mid-trial when the presiding Tax Court judge fell ill. See pages 49-50, *infra*.

party deliberately delayed raising the issue until the case was decided against him.[44]

No meaningful distinction can be drawn between the structural principle at issue here and the one considered by this Court in *Schor*.[45] There can be no hierarchy among separation of powers principles, in which some are fundamental and nonwaivable while the judicial vindication of others may be relegated to the vagaries of individual litigation strategies. If anything, the grounds for nonwaivability are even clearer and more straightforward here than in *Schor* or *Pacemaker*, since the Appointments Clause is purely structural and, unlike the Article III principles parsed into their respective personal and structural components in those cases, has no "personal rights" element.

The government nevertheless attempted in its Brief in Opposition to characterize the Appointments Clause as some sort of second-class component of constitutional architecture whose protection the federal courts can leave to the parties before it, subject to the usual rules of waiver. The government's premise is that, unlike Article III or any other structural provision of the Constitution, "the Appointments Clause embodies an interest that at least one of the parties to every tax dispute (the United States) can be expected to protect" vigorously, because

[44] *Schor* was such a case. Schor "was content to have the entire dispute settled in the forum he had selected until the ALJ ruled against him on all counts; it was only after the ALJ rendered a decision to which he objected that Schor raised any challenge to the CFTC's consideration of [his opponent's] counterclaim." 478 U.S. at 849. *See Glidden* v. *Zdanok*, 370 U.S. at 535-36 (usual rule "preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware" does "not obtain" when the defect is "jurisdictional" or "is based upon nonfrivolous constitutional grounds").

[45] This case similarly parallels the circumstances in *Pacemaker Diagnostic Clinic* v. *Instromedix*, where a party challenged a magistrate's power to preside over a civil trial and enter the final judgment, despite that party's formal consent to the procedure. In reaching the merits of the constitutional challenge, Judge (now Justice) Kennedy wrote for the *en banc* court that "[s]tatutes or governmental actions which violate the separation of powers doctrine in its systemic aspect should be invalidated, as a general rule, despite waiver by affected private parties." 725 F.2d at 544.

the "structural interests protected by the Appointments Clause are . . . those of the President and the Executive Branch itself." Opp.Br. 19. This Court's precedents, however, explode any such proposition.[46]

For example, the Appointments Clause claims resolved by this Court in *Lamar* v. *United States* and *Morrison* v. *Olson* — that particular appointment mechanisms usurped the Executive appointment power — were raised, as here, by the private parties, not by the government party. In each case, the government party was more interested in preserving the fruits or promises of a particular criminal prosecution than in safeguarding the Constitution's structural integrity.

When it comes to the separation of powers, foxes cannot be trusted to guard henhouses. This Court has never relied exclusively upon the other two branches of government to look after the Constitution's structural blueprints, even when the only apparent injury was to the prerogatives of one of those branches. Both Congress and the Executive have all too often been willing to sell their birthright for a mess of potage — to violate the separation of powers and relinquish certain prerogatives or duties in order to meet some felt necessity or to deal with exigent circumstances.[47] Thus the Executive Branch cannot, any more than any other party, be relied upon to protect

[46] Moreover, even if the branches of the federal government were allowed to relinquish their powers, the appointment power is not a purely Executive prerogative. With respect to inferior officers, appointment power may be lodged by Congress in either the President and his Department Heads or in the Courts of Law. Even if the government's "self-interest" model of separation-of-powers litigation were valid, the Solicitor General has no authority to relinquish or dilute the Appointments Clause prerogatives of the Article III judiciary.

[47] *See, e.g., INS* v. *Chadha* (striking down one-house legislative veto provision agreed to by President and Congress); *Bowsher* v. *Synar* (invoking Appointments Clause to strike down Gramm-Rudman budget-balancing legislation agreed to by President and Congress); *Buckley* v. *Valeo* (invoking Appointments Clause to strike down Federal Election Campaign Act over the objections of the Executive and Legislative Branches that had collaborated on the law). *Cf. Zschernig* v. *Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring) (State Department cannot permit local probate officials to conduct American foreign policy, for the Constitution confers that duty on the Executive Branch, even if a particular President and Secretary of State are willing to relinquish it to others).

the "institutional interests" served by the Appointments Clause and the Constitution's other structural provisions. *CFTC* v. *Schor*, 478 U.S. at 851. Indeed, the Executive Branch has spoken with quite different voices in the course of this very case: while the President himself took a stand against vesting appointment power in Article I courts when this case was being briefed and argued below, the Justice Department now argues that that power may be dispersed to an ever-widening circle of federal officials.

C. In Any Event, There Was No Free And Voluntary Consent Below To Effectively Final Decision By A Special Trial Judge.

Even if this Court were to deem Appointments Clause objections to be "personal" rather than structural, or to decide that some "second-class" structural objections were sometimes waivable, no such waiver should be found here. For in the circumstances of this case, petitioners cannot be said to have voluntarily relinquished their rights to trial before a constitutionally appointed officer.

1. The Statutes and Rules Governing Tax Court Procedure in (b)(4) Cases Neither Require Nor Ensure Consent.

The Tax Court has no procedure whatever even for requiring taxpayer consent to the jurisdiction of a special trial judge exercised here, much less any safeguards for ensuring that consent be knowing and voluntary. Under § 7443A(b)(4), the "chief judge may assign . . . any other proceeding which the chief judge may designate to be heard by the special trial judges of the court," regardless of the taxpayer's wishes. Subsection (b)(4)'s silence as to taxpayer consent can hardly be dismissed as an oversight, for Congress took pains to specify those instances in which taxpayer consent was required. For example, small tax proceedings under subsection (b)(2) may

be assigned to a special trial judge only "at the option of the taxpayer." § 7463(a).

In other statutory regimes governing the use of adjunct adjudicators, Congress has gone to great lengths to specify statutory mechanisms for requiring litigant consent and ensuring that it be fully knowing and voluntary. When the Federal Magistrates Act permits assignment of a case to a magistrate for disposition, it not only requires affirmative consent of the litigant prior to such assignment, but also expressly bars both the district court and the magistrate from attempting to induce such consent and mandates that rules of court "shall include procedures to protect the voluntariness of the parties' consent." 28 U.S.C. § 636(c)(1)&(2). Moreover, a litigant dissatisfied with the magistrate's decision of a dispositive matter is entitled to a *de novo* review by the district court. *Id.* at § 636(b)(1).

Such meticulous statutory safeguards are wholly absent from the statute and rules governing assignment of (b)(4) proceedings to the Tax Court's special trial judges. Where such protection is wholly lacking in the statutory regime, an *ad hoc* "consent" should not lightly be presumed to be free and voluntary, much less treated as a waiver of important constitutional rights.[48]

[48] Petitioners cannot be said to have voluntarily relinquished their rights to trial before a constitutionally appointed judicial officer merely by invoking the jurisdiction of the Tax Court in the first place. First, they consented only to have their cases resolved by legitimate Tax Court judges and not by a special trial judge. At the time the taxpayers' petitions were filed in 1982, § 7443A(b)(4) had not yet been enacted. *Second, CFTC* v. *Schor* forecloses any claim of automatic waiver at the Tax Court's threshold. In *Schor* this Court resolved the structural constitutional claim despite Schor's "express waiver," 478 U.S. at 849, of any such objection when he affirmatively invoked the CFTC's jurisdiction, urged that the alternative suit in the Art.III court be dismissed, and further insisted that the counterclaim that was the subject of his later constitutional objection be brought before the CFTC. *A fortiori*, petitioners — who are not voluntary litigants but citizens facing the coercive power of the government's revenue collection apparatus — cannot be deemed to have waived their structural objections by contesting the IRS deficiency notices in the Tax Court.

2. The Tax Court's Mid-Trial Proposal of Reassignment to a Special Trial Judge Was an "Offer" That Petitioners Could Not Refuse.

The circumstances of this case in any event rendered any "consent" on petitioners' part wholly involuntary. Even a "waiver of personal rights must, of course, be freely and voluntarily undertaken." *Pacemaker*, 725 F.2d at 543. As Judge (now Justice) Kennedy explained in that case, which involved the issue of a magistrate's authority to conduct a civil trial with the parties' consent:

> The purported waiver of the right to an Article III trial would not be an acceptable ground for avoiding the constitutional question if the alternative to the waiver were the imposition of serious burdens and costs on the litigant. If it were shown that the choice is between trial to a magistrate or the endurance of delay or other measurable hardships not clearly justified by the needs of judicial administration, we would be required to consider whether the right to an Article III forum had been voluntarily relinquished.

725 F.2d at 543.

Petitioners were plainly faced with just such a Hobson's choice when Judge Wilbur took a disability retirement from the Tax Court. Petitioners had by then wrestled with the trial for 19 months and had no meaningful choice but to allow the special trial judge to complete the proceedings and prepare findings and an opinion. The alternative was to start all over again and simply scrap a trial that had already generated 9,000 pages of transcript, hundreds of hours of videotape and 3,000 exhibits, and that had already consumed hundreds of thousands of dollars in costs and attorneys fees. The "imposition of [these] serious burdens and costs on the litigant" makes petitioners'

decision to "consent" to reassignment to the special trial judge involuntary. *Pacemaker*, 725 F.2d at 543. Accordingly, this is the *last* case in which a voluntary waiver of constitutional safeguards ought to be found.

CONCLUSION

For the reasons stated above, petitioners urge that the judgment below be reversed and remanded.

Respectfully submitted,

KATHLEEN M. SULLIVAN
Counsel of Record
BRIAN STUART KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4633

RICHARD J. SIDEMAN
MARTHA A. BOERSCH
SIDEMAN & BANCROFT
One Embarcadero Center
Suite 860
San Francisco, California 94111
(415) 392-1960
Counsel for Petitioners

March 1, 1991